BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY K. FORD	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,488
LANDOLL CORPORATION	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE CO. N.Y.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the February 14, 2000 Review and Modification Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on July 6, 2000.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the February 14, 2000 Review and Modification Award and the July 22, 1997 Award. In addition, the record includes the February 9, 2000 preliminary hearing transcript.

ISSUES

Claimant injured his back on November 15, 1995, while working for respondent. The claim was litigated and Judge Benedict issued an Award on July 22, 1997, finding claimant had a 100 percent wage loss and a 0 percent task loss that created a 50 percent permanent partial general disability. That Award was appealed to the Appeals Board, which affirmed the 50 percent work disability. Respondent and its insurance carrier appealed the Board's decision to the Court of Appeals. On February 11, 2000, while this

proceeding was pending before the Appeals Board, the Court of Appeals issued its decision which affirmed the Appeals Board.

While the original award was pending before the Court of Appeals, respondent and its insurance carrier learned that claimant had started working for the City of Manhattan and that claimant, therefore, no longer had a 100 percent wage loss. On October 28, 1999, respondent and its insurance carrier filed an application with the Division of Workers Compensation to review and modify the Board's original decision.

On December 8, 1999, the parties appeared before Judge Benedict for a review and modification hearing. After that hearing, in which claimant testified that he began working for the City of Manhattan in March 1998, the Judge entered an Order dated December 9, 1999, declaring that claimant was disqualified from receiving any further permanent partial disability benefits.

On February 14, 2000, Judge Benedict entered the Award in the Review and Modification proceeding, which is the subject of this appeal. In that Award, the Judge found that claimant started working for the City of Manhattan on March 16, 1998, and that the effective date for modifying the award was April 28, 1999. Additionally, the Judge found that as of April 28, 1999, claimant was earning at least 90 percent of his pre-injury average weekly wage and, therefore, claimant no longer had any work disability as of that date. Finally, the Judge found that in January 2000 claimant had been terminated by his new employer, the City of Manhattan, for reasons unrelated to the injuries that he sustained while working for respondent.

Based upon those findings and conclusions, the Judge decreased the permanent partial general disability from the 50 percent work disability to claimant's nine percent whole body functional impairment rating. Because the award for a nine percent permanent partial general disability had been exhausted as of the effective date of the modification (April 28, 1999), claimant was not entitled to receive any additional permanent partial disability benefits.

Claimant contends that Judge Benedict erred. Claimant argues that the low back injury that he sustained while working for respondent was a substantial factor in his termination from the City of Manhattan. Therefore, claimant argues that the permanent partial general disability benefits should be reinstated as of the date that claimant was terminated by the City of Manhattan. Finally, claimant also argues that the Judge had no jurisdiction to modify the original award as it was pending before the Court of Appeals.

The only issues before the Appeals Board on this review are:

1. Did the Judge have the jurisdiction to determine an application for review and modification while the original award was pending before the Court of Appeals?

2. Did claimant's employment with the City of Manhattan constitute such change of circumstances to modify the original award, which was based upon a 100 percent wage loss?

3. Did claimant's termination of employment with the City of Manhattan constitute such change of circumstances to modify the award?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant injured his low back on November 15, 1995, while working for respondent. Claimant performed light-duty work until January 11, 1996, when he was taken off work by his treating physicians. In January 1997, while off work, claimant injured his neck and eventually had cervical disc surgery and a fusion. The neck injury was neither related to claimant's work nor his low back injury.

2. The parties litigated this claim and Judge Benedict originally determined that claimant had a 50 percent permanent partial general disability. That award was entered on July 22, 1997. The parties then appealed that decision to the Appeals Board which affirmed the Judge's findings and conclusions that claimant had a 100 percent wage loss, a 0 percent task loss, and a 50 percent permanent partial general disability. Additionally, the Appeals Board found that claimant had a nine percent whole body functional impairment as a result of the November 1995 accident and the resulting low back injury.

3. Respondent and its insurance carrier then appealed the Appeals Board's decision to the Court of Appeals. On February 11, 2000, the Court of Appeals affirmed the Appeals Board's decision.

4. On March 16, 1998, claimant began working full-time for the City of Manhattan as a Maintenance Worker I in the City's traffic division. Effective March 1999, claimant's hourly wage rate was increased to $8.12 per hour creating a straight-time wage of $324.80 per week. Additionally, claimant earned overtime and received employer-paid health insurance benefits. As of March 1999, the City of Manhattan paid $243.38 per month towards claimant's health insurance, which equals $56.16 per week. Further, as of April 1, 1999, the City contributed $9.55 per week to claimant's retirement benefits.

5. Excluding overtime earnings, claimant's average weekly wage with the City of Manhattan equaled $390.51. That wage exceeded the $351.53 stipulated average weekly wage that claimant was earning on the date of accident working for respondent.

6. Claimant last worked for the City of Manhattan on or about November 19, 1999. At that time, claimant was placed on a paid suspension and instructed to obtain medical clearances that it was safe to work while taking several prescribed medications. The

interoffice memorandum from the City's human resources department to claimant dated November 19, 1999, reads in part:

> . . . During our conversation, you told me that you were taking several prescription medications, naming at least four such medications by name. You also told me that you felt that you were (are) impaired by these medications. You related to me that you had already told your supervisor that you should not be driving, and that as a result, you are no longer driving a City vehicle during the work day. . . . we are concerned about your ability to function safely and appropriately in the other aspects of your job, apart from the driving issue.
>
> We have decided to require you to provide us with a statement from the physician or physicians who are prescribing these medications to you. This statement will give us assurances that you are able to take these medications, separate or in combination, and still function safely and appropriately in your job. . . .

7. By letter dated December 16, 1999, the City of Manhattan notified claimant that he would be terminated for falsifying his employment application, making false statements, failing to disclose information during the hiring process, and demonstrating erratic and unacceptable behavior. That letter reads, in part:

> Even if you are able to provide us with the above documents, please be advised that we intend to terminate your employment with the City at the end of the FMLA leave period, with (again) the following as the basis for termination:
>
> 1. Falsification of employment application.
>
> 2. Making false statements or failure to disclose information during the recruitment and selection process; misrepresentation.
>
> 3. Erratic or unacceptable behaviors in relations with City departmental employees.
>
> . . .
>
> Even though we are putting you on notice of our intent to terminate, we will give serious consideration to any reasons you provide showing good cause to stop the termination, to any appeals you elect to submit, and to any specific request for reasonable accommodation. However, you should know that the City considers falsification of employment application materials to be very serious. It is clearly stated on the bottom of the employment application

> form that any misstatements or omissions are grounds for discharge from City service. You signed below this statement on the application, stating that you understood this to be the case.

The December 16, 1999 letter recites that claimant told the City of Manhattan human resources personnel that he had sustained a neck injury. But the letter does not mention that claimant reported having a low back injury.

8. Although the exact date is unclear, the City of Manhattan terminated the paid suspension and on January 19, 2000, the City terminated claimant's employment.

9. Claimant argues that he was terminated by the City of Manhattan because he was taking medications for the low back injury that he sustained while working for respondent and for the later neck injury. But a close review of the evidence fails to establish what part, if any, the low back injury played in claimant's termination.

First, the record is void of medical evidence or other competent evidence that addresses whether the medications that claimant was taking while employed by the City of Manhattan were being prescribed for the 1995 low back injury or whether they were being prescribed for the 1997 neck injury or for some other condition. In effect, claimant requests the Appeals Board to infer that he continues to experience low back problems that are the natural consequence of the 1995 accident in contrast to some other cause, including a new and separate injury. The Appeals Board is unable to draw such an inference based upon the current record.

Second, the evidence fails to establish that the City of Manhattan terminated claimant because of his physical condition rather than for falsifying his employment application.

10. Respondent and its insurance carrier filed this review and modification proceeding on October 28, 1999. Six months preceding that filing date is April 28, 1999.

CONCLUSIONS OF LAW

1. The Review and Modification Award should be affirmed.

2. All awards, except those lump sum settlements approved by the Director of the Division of Workers Compensation or an administrative law judge, may be reviewed upon good cause shown. The award may be modified if (1) it was obtained by fraud or undue influence, (2) it was made without authority or as the result of serious misconduct, (3) it

was excessive or inadequate, or (4) the worker's functional impairment or work disability has changed.[1]

3. When an award is modified because of a change in the functional impairment or work disability, the effective date of the change is the date that the change occurred, except that the effective date of the change cannot be more than six months before the date upon which the review and modification application was filed.[2] As indicated in the findings above, respondent and its insurance carrier filed the application for review and modification on October 28, 1999. Because of the six-month rule, the earliest effective date of any change in the award is April 28, 1999.

4. Respondent and its insurance carrier have established that as of April 28, 1999, claimant was earning more than 90 percent of his average weekly wage on the date of the accident.

A worker's permanent partial general disability rating is limited to the functional impairment rating when that worker earns a post-injury wage equaling or exceeding 90 percent of the average weekly wage that the worker was earning on the date of accident. The Workers Compensation Act provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.**[3] (Emphasis added.)

Because claimant's post-injury average weekly wage as of April 1999 exceeded 90 percent of the pre-injury wage, effective April 28, 1999, claimant's permanent partial

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[1] K.S.A. 44-528(a).

[2] K.S.A. 44-528(d).

[3] K.S.A. 44-510e.

general disability should be reduced to the nine percent whole body functional impairment rating.

5. Claimant has failed to establish that the low back injury that he sustained in November 1995 while working for respondent was a factor in his being terminated in January 2000 by the City of Manhattan. Therefore, claimant's request to reinstate the permanent partial general disability benefits effective January 2000 should be denied.

6. The Appeals Board adopts the findings and conclusions set forth in the Review and Modification Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the February 14, 2000 Review and Modification Award entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Frederick J. Greenbaum, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director